

DOCUMENT RESUME

ED 430 431

HE 031 990

AUTHOR Flygare, Thomas J.
TITLE What To Do When the U.S. Department of Labor Comes to Campus: Wage and Hour Law in Higher Education.
INSTITUTION National Association of Coll. and Univ. Attorneys, Washington, DC.
PUB DATE 1999-00-00
NOTE 33p.
AVAILABLE FROM NACUA Publications, One Dupont Circle, Suite 620, Washington, DC 20036; Tel: 202-833-8390; Fax: 202-296-8379; e-mail: nacua@nacua.org; Web site: <http://www.nacua.org> (\$8).
PUB TYPE Guides - Non-Classroom (055)
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Colleges; Compensation (Remuneration); Court Litigation; Employer Employee Relationship; *Employment Practices; *Federal Legislation; Federal Regulation; *Higher Education; *Labor Legislation; Legal Problems; *Legal Responsibility; Overtime; Recordkeeping; Salaries; Universities; Wages
IDENTIFIERS *Fair Labor Standards Act

ABSTRACT

This pamphlet provides guidelines to higher education institutions for responding to U.S. Department of Labor (DOL) investigations and complying in general with the wage and hour provisions of the 1938 Fair Labor Standards Act (FLSA). It provides a hypothetical case study to illustrate some of the basic principles of the FLSA in regard to colleges and universities, focusing on DOL inspection rights, overtime pay issues, employee classification, and compensatory (comp) time off. The pamphlet goes on to discuss federal regulations affecting exempt (salaried) employees, noting that one of the most common mistakes made by employers is improper deductions from the predetermined salaries of exempt employees. It discusses the differences between executive, administrative, and professional employees and independent contractors. The pamphlet then discusses federal regulations affecting nonexempt (hourly) employees, focusing on the determination of the regular rate of compensation, hours worked, joint employment, alternatives to overtime compensation, and voluntary work by employees. It also reviews recordkeeping requirements and penalties applicable under the FLSA. (Contains 12 footnotes.) (MDM)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

ED 430 431

NACUA

THE PUBLICATION SERIES

What To Do When the U.S. Department of Labor Comes to Campus:

Wage and Hour Law in Higher Education

THOMAS J. FLYGARE

PERMISSION TO REPRODUCE AND
DISSEMINATE THIS MATERIAL IN
MICROFICHE ONLY HAS BEEN GRANTED BY

NACUA

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)

2B

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

- ☒ This document has been reproduced as received from the person or organization originating it.
- ☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

National Association of College
and University Attorneys



Thomas J. Flygare is a graduate of St. Olaf College (B.A. 1966), the University of Wisconsin-Madison (M.A. 1967, Ph.D. 1971), and the Boston University School of Law (J.D. 1974). He was Vice Chancellor and General Counsel for the University System of New Hampshire from 1977 to 1986 and, for 12 years, was a partner at Sheehan, Phinney, Bass & Green in Manchester and Portsmouth, New Hampshire. He is currently a partner in the Exeter, New Hampshire law firm, Flygare, Schwarz & Closson. Mr. Flygare represents a number of colleges and school districts, and is legal counsel to the New Hampshire College and University Council and the New Hampshire School Administrators Association. He has served as General Editor of the NACUA pamphlet publication series since 1988, and was elected a NACUA Fellow at the 1998 Annual Conference.

The author gratefully acknowledges the invaluable assistance of Fran Bazluke, Nick Long, and Linda Henderson in the development of this pamphlet.

This is one of a series of publications from NACUA, an organization of colleges and universities joined together for mutual assistance in identifying and resolving legal problems.

The views expressed herein are attributed to the author and not to the National Association of College and University Attorneys. This pamphlet is intended for general informational purposes only, and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any legal matter or case.

© 1999 National Association of College and University Attorneys

Printed in the United States of America

What To Do When the U.S. Department of Labor Comes to Campus: Wage and Hour Law in Higher Education

When the Fair Labor Standards Act (FLSA) was enacted in 1938, it provided employees a minimum wage and an overtime premium for hours worked in excess of a maximum weekly limit. Initially, the FLSA applied only to employees "engaged in commerce or in the production of goods for commerce." Federal, state and local government employees were specifically excluded. In 1961, Congress decided to change the FLSA coverage formulation from employee-based to "enterprise"-based. Thus, the FLSA was amended to cover all employees of any private "enterprise" engaged in commerce or production for commerce, provided the enterprise fell within a list of categories. That list did not include educational institutions.¹ In 1966, for the first time, Congress explicitly addressed educational institutions by extending coverage of the FLSA to elementary and secondary schools and to institutions of higher education regardless of whether the school or institution was "...public or private or operated for profit or not for profit." That expanded coverage was challenged, but ultimately upheld by the United States Supreme Court. *Maryland v. Wirtz*, 392 U.S. 183 (1968).²

In 1974, Congress further expanded FLSA coverage to include most other state and local governmental employees, but these amendments were blocked by the Supreme Court. *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Court reversed *Usery* in 1985 and upheld the authority of Congress to extend FLSA coverage to employees of state and local governments. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

1. Ironically, at least one university suffered a judgment under the original FLSA coverage formulation. In *Spaeth v. Washington University*, 213 S.W. 2d 276 (Mo. App. 1948), a watchman at an off-campus warehouse owned by the University was determined to be "engaged in commerce" and awarded a small overtime payment along with attorneys fees.

2. Duke University later unsuccessfully argued that, even though it was an "enterprise" covered by the 1966 amendments, it was nonetheless exempt as a "retail establishment." *Hodgson v. Duke University*, 460 F.2d 172 (4th Cir. 1972).

The battle over the jurisdictional reach of the FLSA was relatively quiet until the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), holding the states had Eleventh Amendment immunity from certain types of lawsuits in federal court. On the basis of *Seminole Tribe*, virtually all courts that have considered the issue have held that the federal courts have no jurisdiction over FLSA claims filed by individuals against state agencies.³ These rulings, however, make clear that state employees are not removed from the aegis of the FLSA. In fact, the Sixth Circuit Court of Appeals has noted that the following legal avenues remain open to enforce the substantive provisions of the FLSA against states:

- The U.S. Department of Labor (DOL) may bring suit in federal court for money damages under the FLSA on behalf of state employees;
- State employees may sue in state court for money damages under the FLSA (see *Jacoby v. Arkansas Dept. Of Education*, 4 WH Cases 2d 686 (Ark. 1998)); and
- State employees may sue a state officer in federal court for an injunction ordering the officer to comply with the FLSA. *Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996), but see *Mills v. Maine*, 118 F.3d 37, 55 (1st Cir. 1997) (suing a state official in federal court for injunctive relief under the FLSA would be an "end run" around *Seminole Tribe*.)

It is clear, therefore, that institutions of higher education, both public and private, have a strong incentive to comply with the FLSA in all respects. While the threat of an FLSA lawsuit in federal court against a state institution may have been reduced as a result of *Seminole Tribe*, a prudent approach to institutional risk management would suggest careful adherence to FLSA requirements (see page 26 for additional discussion on "State and Local Wage Laws;" because there is no federal pre-emption, state and local laws will apply).

This pamphlet is designed as a guideline to institutions of higher education in responding to DOL investigations and complying in general with the wage and hour provisions of the FLSA. It starts

3. See, for example, *Palotai v. University of Maryland College Park*, 959 F.Supp. 714 (D. Md. 1997).

with a "Case Study" to illustrate some of the basic principles of the FLSA; it then examines the concepts governing exemptions from the overtime requirements of the FLSA; and finally, it addresses a number of issues pertaining to calculating working time and overtime compensation for hourly employees. The pamphlet, however, does not address issues of affirmative action, minimum wage, child labor, equal pay or prevailing wages; those topics are beyond the scope and size of this publication.

CASE STUDY

Joyce Timeclock, an investigator from DOL, appeared at the University's Athletic Department and requested access to the payroll records for all departmental personnel. The Athletic Director, Ralph Crewcut, suspected this investigation was prompted by a complaint from a disgruntled ex-employee, James Smooth, whose job was to recruit high school football players from a distant region of the country. Smooth recently quit after unsuccessfully attempting to negotiate large increases in his salary and expense account. Smooth did no teaching and was paid a straight salary through payroll. He was also paid a set amount each month for expenses, and was not required to submit any receipts or details verifying those expenses.

Most full-time Athletic Department employees, including all coaches, trainers, public relations staff and equipment room personnel, were on fixed salaries and were not eligible for overtime compensation. Full-time employees not on fixed salaries were given standing orders to enter 40 hours on their timecards each week, regardless of hours actually worked. There was an informal "comp time" system for these employees, whereby overtime worked during the athletic season may be recouped through time-off after the season. All Athletic Department employees, both salaried and hourly, were eligible for "bonuses," paid out of funds raised through booster donations. The bonuses varied with the win-loss records of the teams, and were usually calculated using a formula based on the employee's regular university compensation (e.g., each employee gets a "bonus" equal to 3% of total annual compensation).

ANALYSIS OF THE CASE STUDY

The arcane world of federal wage-hour law is governed by the FLSA, 29 U.S.C. §§201-263, and DOL regulations, 29 C.F.R. Parts 500-794. The statute and regulations are often difficult to apply for a variety of reasons. First, some of the basic legal concepts have a variety of inexplicable exceptions, many of which stem directly from persistent lobbying. Second, the age of the statute and many of the regulations create problems of obsolescence. For example, the regulation on white collar employees (last amended in 1975) defines "high salaried executives" as managerial employees earning at least \$13,000 per year. 29 C.F.R. §541.119. Third, the length and complexity of the regulations (over 1000 pages of single-spaced, double-columned text) make research on even the simplest issue an intimidating experience. Finally, many of the key legal interpretations of the FLSA are contained in *Opinion Letters* issued by the DOL's Wage-Hour Administrator. Although the *Opinion Letters* are published by several reference services, they are not yet on the DOL's Web Page (<http://www.dol.gov>), and may not be readily available to campus human resources or legal staffs. With this brief background, what follows is a discussion of some of the issues raised by the case study.

Is Timeclock entitled to inspect payroll records for all Athletic Department personnel?

Yes. The FLSA authorizes the DOL to "...enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as ... necessary or appropriate to determine whether any person has violated any provision of this chapter..." 29 U.S.C. §211(a). Accordingly, while Timeclock may be willing to delay the investigation for a brief period to avoid undue confrontation, there is little doubt that the University would ultimately have to provide the requested records and permit Timeclock to interview employees. The DOL Wage-Hour Administrator may, if necessary, issue subpoenas to obtain employer records.

According to the *Wage and Hour Division Field Operations Handbook*, §52a09, at the first inter-

view with an employer, the DOL compliance officer should:

- Inform the employer that the purpose of the visit is to make an investigation to determine compliance with the Act;
- Outline the scope of the investigation;
- Provide non-technical publications;
- Explore with the employer whether it believes its business is subject to the Act and its general compliance approach;
- Obtain the exact legal names of the establishment and any trade names, the address of the establishment, full name of owners or officers, the employer's federal tax identification number, the number of persons employed by the establishment, and the name and address of the supervising office if the establishment is a branch.
- Obtain names and occupations of employees who the employer claims are exempt; and
- Obtain information regarding injuries to minors.

At the start of a recent investigation, a DOL compliance officer in New England requested that the following information be available on the projected date of the site visit:

- I-9 form (employee eligibility verification form);
- Payroll records beginning with the most current payroll and working back two years (weekly wages paid and hours worked for each employee);
- Time records corresponding to the same two-year period as the payroll records;
- Youth employment certificates required by state law for any minors employed in the last two years;
- Extra copy of the most recent payroll;
- Addresses for all employees employed in the prior two years;
- List of salaried individuals (including their exempt status and positions); and
- Description of the types of bonuses and commissions that employees receive.

The records will normally be inspected by the DOL compliance officer on the employer's premises. Records will be removed from the employer's premises only when absolutely necessary and only with the employer's consent. *Field Operations Handbook*, §52b00-01.

Is the DOL required to disclose whether the audit was prompted by a complaint?

No. Timeclock is not required to disclose whether Smooth filed a complaint or even to disclose whether or not the investigation was prompted by a complaint from anyone. Most compliance officers will state that the investigation could have been the result of a DOL plan to investigate employers in the area randomly, a DOL review of a particular industry, or a complaint or other information indicating possible unlawful conduct. However, DOL Publication 1340 states specifically: "If the Division has received a complaint, the compliance officer must treat the complaint confidentially."

How far back will the DOL review payroll records?

The FLSA has a general two-year statute of limitations, or three years when the employer has committed a "willful" violation. 29 U.S.C. §255(a).⁴ DOL investigators will initially request records for the past two years. Likewise, any preliminary calculation of back wages that may be due under either the minimum wage or overtime provisions of the FLSA normally will be for a two-year period, not the three-year period permitted for willful violations.

Is the DOL permitted to conduct private interviews with employees?

Yes. The purpose of the interviews is to determine the accuracy of the records provided by the employer and to substantiate or refute any alleged violation. Timeclock will also permit the employees to point out any other suspected violations. *The Field Operations Handbook*, §52c01, states that compliance officers should be certain that employ-

4. The Supreme Court has held that willfulness requires either knowledge by the employer that its conduct was prohibited by the FLSA or reckless disregard of whether its conduct was prohibited. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). For application in an educational setting, see *Marshall v. Baptist Hospital, Inc.* 473 F. Supp. 465 (M.D. Tenn. 1979).

ees are given the opportunity to be interviewed under conditions that assure privacy and protect the confidentiality of the information provided. If this is not possible on the employer's premises, the interviews may take place at an employee's home or any suitable place in the community, such as a church or post office. An interpreter will be allowed to attend the interview when necessary. Timeclock will attempt to obtain signed statements from all interviewed employees.

Are university attorneys allowed to attend employee interviews?

No. The employee interviews are intended to be private and confidential. Attorneys for the University or other members of the management are not allowed to attend, even if requested by the employee. If an employee insists upon being accompanied by the University attorney during an interview, Timeclock would probably refuse to conduct the interview. The only exception is when Timeclock interviews management personnel in an effort to understand the University's compensation policies and practices. Timeclock would normally have no objection if a University attorney attended such a meeting.

Could the DOL investigation spread from the Athletic Department to other parts of the university?

Yes. Depending upon Timeclock's schedule and the priorities of the DOL at the time, the investigation could certainly encompass other departments of the University. For example, if the inspector discovered a University-wide payroll practice that violated the FLSA, the DOL might request to see the records for the entire University and seek appropriate backpay awards. Simply because the investigation of the Athletic Department may have been prompted by a complaint from a disgruntled ex-employee of that Department does not preclude the possibility of the investigation moving into other parts of the University.

Is there any problem with the way Smooth, the football recruiter, was paid?

Yes. If the investigation was triggered by a complaint from the football recruiter, then the DOL will very quickly pursue the issue of whether

Smooth was "exempt" from the overtime requirements of the FLSA. This concept will be discussed in greater detail in the section on "Exempt Employees" beginning on page 11. In general, however, an employee is entitled to compensation at one and one-half times his or her regular rate for each hour over 40 worked in a week, unless the employee qualifies for the executive, administrative, or professional exemptions. It appears, based upon the brief description of the football recruiter's duties in the Case Study, that Smooth would not qualify for one of these exemptions. Accordingly, if Smooth worked over 40 hours in any one week, he would be entitled to one and one-half times his "regular rate" for the overtime work.

In calculating the recruiter's "regular rate," the DOL would calculate his total compensation for any week in which he worked overtime. This would include not only his salary but possibly also a portion of the set amount that he was paid each month for his expenses. The DOL regulations state in pertinent part:

It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate. 29 C.F.R. §778.217(c).

(See also the discussion on page 10 of how a bonus may also be part of the calculation.)

Given the nature of the position, Smooth could probably assert with some credibility that he regularly worked in excess of 40 hours per week. Particularly if travel time is considered (29 C.F.R. §§785.33- 41), he may be able to make a plausible case for a significant number of overtime hours each week. However, if Crewcut can establish that there was "a clear mutual understanding" with Smooth that he would receive straight salary regardless of the number of hours he was called upon to work in a workweek, then the DOL may calculate the backpay overtime award at 50% of the regular rate, not 150%. 29 C.F.R. §778.114. This often-overlooked section of the DOL regulations may be applicable in situations where non-exempt employees work fluctuating hours from week-to-week. The employer and employee may enter into an "understanding" that the employee will receive a set salary every week regardless of the hours worked. The regulations do not require

that this be in writing, although documentation of such an agreement would obviously be a prudent step to take. If the employee's hours are less than forty in any given work week, the employee still receives the set salary. If the hours are more than forty in a week, the employee is entitled to the set salary plus 50% of the "regular rate" (salary divided by the number of hours worked) for all hours over forty.

Are other salaried Athletic Department personnel properly classified?

Probably not. It appears from the facts presented in the Case Study that many employees in the Athletic Department are paid on a salary basis and are not eligible for overtime. The DOL will probably make some preliminary judgments about whether each of these employees is properly classified as "exempt," discussed in more detail beginning on page 11 of this pamphlet. If any is not properly classified, then there is the strong possibility that the DOL will seek an overtime backpay award for such employee.

Experience suggests that many positions in institutions of higher education may be misclassified as exempt. For example, the Case Study indicated that employees who are required to work on game days, including equipment room personnel, were paid a salary and were not eligible for overtime. The DOL probably would look carefully at a number of these positions to determine if in fact the overtime exemptions are justified.⁵

All exemption situations are very fact-specific. Actual duties may vary greatly even among people who work in the same position. Although a particular position (e.g. equipment room worker) at one university may not be eligible for the overtime exemption, the DOL compliance officer should look at actual duties before determining that the exemption is not available.

What is the liability for improperly classifying employees as "exempt"?

If the DOL compliance officer determines that a particular employee has been misclassified as exempt, several steps can be taken to determine

5. It has been held that equipment managers in a university's intercollegiate athletic program were nonexempt employees eligible for overtime compensation. *DiGregorio v. Temple University*, 26 WH cases 1184 (E.D.Pa. 1983).

what, if any, backpay award may be required. One is to determine how many hours, if any, the employee worked overtime in the previous two years. Since there are rarely time records available for making this determination, the employee and others will be interviewed to verify how much overtime was actually worked during this time period. Employee estimates of their own hours are notoriously inflated, and the DOL rarely uses them as the sole determinant of overtime hours. In fact, the DOL often will reduce employees' estimates of their own overtime by as much as 50%.

Another step in deciding the size of any backpay award is to determine the "regular rate" of each employee. An employee's "regular rate" is normally his or her total compensation for a workweek divided by the number of hours worked. 29 C.F.R. §778.108. In the Case Study, Athletic Department employees also received a bonus from funds raised by the Booster Club, which will probably have to be added to the base compensation, on a pro-rated basis for the number of weeks to which the bonus was applicable, for the purpose of determining the regular rate. 29 C.F.R. §778.208. Doing so will, of course, raise the backpay award if overtime compensation is calculated.

Is there a problem with the informal "comp time" arrangement for the hourly employees of the Athletic Department?

Yes. Hourly employees are entitled to be paid one and one-half times their regular rate for all hours worked in excess of 40 in a workweek. The exceptions to this rule are extremely limited. The FLSA authorizes public agencies (but not private or not-for-profit employers) to provide compensatory time off ("Comp Time") in lieu of monetary overtime compensation, at a rate of not less than one and one-half hours of compensatory time for each hour of overtime worked.

The rules on Comp Time in public agencies are very specific, and careful record keeping is required. 29 C.F.R. §§553.20-28. Thus, employees of state and local governments may be required to take "Comp Time" in lieu of overtime compensation provided that, if an employee accrues more than 240 hours of overtime (480 hours for public

safety, emergency response, or seasonal personnel), all additional overtime hours worked must be paid as wages rather than time off at one and one-half times the regular rate earned by the employee at the time such payment is received.

EXEMPT EMPLOYEES

The starting point in avoiding FLSA liability is to determine if employees are properly classified as exempt or non-exempt. Those who are correctly classified as exempt (sometimes called "salaried") are not entitled to overtime compensation for working in excess of 40 hours in a week. To maintain "exempt" status, employees must be paid "on a salary basis" and their responsibilities must fall within one or more of the broad exemptions, known as "executive," "administrative," and "professional." 29 C.F.R. Part 541.

Payment on a Salary Basis

It is critically important that the duties of salaried employees not only qualify them for one of the above exemptions, but that they also be compensated "on a salary basis," which means they are entitled to receive a predetermined amount of compensation each workweek "...not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. 541.118. Therefore, even if the duties performed by an employee would otherwise qualify him or her for the overtime exemption, the exemption is not available if the employee is not being paid on a strict "salary basis."

Unlawful Deductions

The most common mistake made by employers in this area is improper deductions from the predetermined weekly salary. If an exempt employee is not reporting for work on time, or if his or her attendance is unsatisfactory, this should be treated as a disciplinary matter, not as a matter of compensation.

Among the deductions to avoid are the following.

Jury duty, witness attendance, or military leave. Deductions from the compensation of a salaried employee should not be made for ab-

sences caused by jury duty, attendance as a witness, or temporary military duty. However, amounts earned by the salaried employee in these capacities during a workweek may be offset against his or her salary for that particular week. 29 C.F.R. 541.118 (a) (4).

Partial-day absences. One of the most difficult topics at the moment in wage and hour law is the deduction from salary for partial-day absences. A careful review of the list of lawful deductions below indicates that deductions for personal or sick leave are permitted only if the absence is for a day or more. The only exception is unpaid leave taken for an FMLA purpose. This creates the anomaly that a salary deduction may be taken from a salaried employee who is absent for an afternoon to take a spouse to the hospital for emergency treatment or chemotherapy but not for an employee who takes the afternoon off to watch a ball game.

The DOL and the courts have not developed a consistent approach to issues involving partial-day absences for salaried employees. The DOL has adopted rules allowing public agencies to establish pay systems "pursuant to principles of public accountability" for salaried employees leading to reductions in compensation for absences of less than one day for personal reasons or because of illness or injury when (a) permission to use paid leave was not requested or was requested and denied; (b) accrued paid leave has been exhausted; or (c) the employee chooses to use leave without pay. 29 CFR 541.5d.⁶ These rules, however, are not applicable in the private and not-for-profit sectors, and some courts, even in the public sector, have chosen to disregard them. Moreover, there is a tendency of some courts to rule that policies that permit deductions from accrued leave (e.g., sick leave, vacation, or earned time) will destroy the overtime exemption for any salaried employee subject to that policy. It is beyond the scope of this pamphlet to analyze the legal status of this issue in every jurisdiction; nevertheless, employers should seek competent legal advice when developing any policies on partial-day absences for salaried employees.

6. See *Spradling v. City of Tulsa*, 3 WH Cases 2d 823, 828-29, 95 F.3d 1492 (10th Cir. 1996) cert. denied __ S.Ct. __ (1997), holding that, if a public agency has discretion whether or not to take partial-day deductions, then the "public accountability" test is not met.

Additional compensation subject to deductions.

There are certain circumstances in which salaried employees may be paid additional compensation without jeopardizing their exempt status. It is acceptable, for example, to pay an exempt employee a commission or a bonus for reaching certain benchmarks, or to offer additional compensation on a shift or daily basis. 29 CFR 541.118(b). However, as a general rule, it is best to avoid situations whereby the University is paying hourly wages to an exempt employee for work performed in a non-exempt position. By way of illustrating the potential problems, consider the following.

A full-time, salaried supervisor in the University's dining services requests the opportunity to earn additional income by working as an hourly employee on the catering crew in the evenings and on weekends. According to the Department of Labor regulations, the only way this could be done, without risking the employee's exempt status as a supervisor, may be to pay him or her overtime compensation for every hour worked on the catering crew. This is because exempt employees are assumed to have worked, and are generally paid for working, a 40-hour week (or whatever else the University considers to be a "full work week"). They are not penalized by a deduction in salary for working less, nor are they compensated for working more. Because it is assumed that the supervisor has already worked a full week for the employer in his or her exempt job, he or she is entitled to receive overtime compensation for every hour worked in the non-exempt second job because it is the same employer. Paying him or her otherwise would have the effect of essentially converting the Supervisor's salaried position into an hourly job because, as stated above, the DOL assumes that exempt employees work a full week regardless of the number of hours actually worked.

Extreme caution should be exercised, therefore, before allowing an exempt employee to work a second job for the University on an hourly wage basis. The DOL frowns upon such arrangements as possibly "...circumventing the requirements of payment on a salary basis." *Opinion Letter WH-528* (January 22, 1988).⁷

7. But see *IAFF Local 2141 v. City of Alexandria*, 29 WH Cases 782 (E.D. Va. 1989) holding that payment on an hourly basis for certain work by exempt employees is "expressly permitted by the labor regulations," a view not shared by the author or DOL.

Lawful Deductions

The types of deductions that may be made from the compensation of a salaried employee are quite limited, as delineated below.

Work unavailable for an entire workweek. The compensation of salaried employees may not be reduced as a result of absences during the workweek caused by either the employer or the operating requirements of the business. If the employee is ready and able to work, deductions from salary may not be made for periods during the workweek when work is not available. However, the employee does not need to be paid for any full workweek in which he or she does not perform any work, or for those portions of either the initial or terminal workweeks during which he or she did not work. 29 C.F.R. 541.118(c). Deductions may also be made from the compensation of salaried employees of public agencies for absences due to a "budget-required" furlough. 29 C.F.R. 541.5d.

Personal time. Deductions may be made from the compensation of a salaried employee for absences from work *for a day or more* for personal reasons *other than sickness or an accident*, if the employee chooses not to use, or does not have the option of using, other accrued leave.

Sick or disability leave. If the employer has a bona fide plan, policy or practice of providing compensation for loss of salary due to both sickness and disability, and a salaried employee has not yet qualified under such plan, or has exhausted all leave allowances set forth by the plan, deductions may be made from the compensation of the salaried employee for absences *of a day or more* caused by sickness or disability, including industrial accidents. The special provisions for partial day absences by employees of public agencies is discussed on page 12 under *partial-day absences*.

Major safety rule infractions. Deductions may be made from the compensation of a salaried employee who violates "safety rules of major significance," imposed by the employer in good faith for the welfare of all employees. The DOL defines this as follows:

Safety rules of major significance including only those related to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, or oil refineries and coal mines. 29 C.F.R. §541.118(a)(5).

A deduction from salary for a violation of disciplinary rules that would not, according to the DOL, amount to "major" safety rule infractions would be improper, and might cause the loss of the overtime exemption. *Auer v. Robbins*, 117 S.Ct. 905 (1997).

FMLA leave. The employer may make deductions from a salaried employee's compensation for *any hours* (i.e., the employee does not have to be absent for a day or more) taken as unpaid FMLA leave during a workweek without affecting the exempt status of the employee. 29 C.F.R. §825.205.

Physicians, lawyers, and teachers. Although physicians, lawyers, and teachers are clearly exempt as professionals from the overtime and minimum requirements of the FLSA, there is a special provision that allows them to be paid on a daily or hourly basis without losing the exemption. This special provision applies to:

- A holder of a valid license or certificate permitting the practice of law or medicine who is actually engaged in practicing the profession;
- A holder of the requisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of the profession of medicine; and
- An employee employed and engaged as a teacher in the activity of imparting knowledge. 29 C.F.R. §541.314

Primary Duty

In order to qualify for the executive, administrative, or professional exemptions under the "short test," the employee who is paid on a "salary basis" must devote over 50% of his or her time to activities integral to the purpose of the exemption. For example, an employee fitting the executive exemption must devote 50% or more of his or her time to management activity. This concept is commonly referred to as the "primary duty requirement." 29 C.F.R. §541.103.

Time, however, is not the sole test of the "primary duty" requirement. In situations where the employee does not spend over 50% of his or her time on the specified duties, the "primary duty" test will still be met if other pertinent factors are present, including: the relative importance of the exempt duties performed by the employee compared to the various nonexempt duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the salary of the employee and the salary of persons doing exclusively nonexempt work. These requisites are particularly important for such positions as "working foreman" or other supervisory positions that require the employee to spend a significant amount of time performing the same duties as his or her subordinates.

The "Short Test"

Each of the exemptions to the requirement of overtime compensation has both a "long test" and a "short test." The "short test" is allowed if the employee is earning compensation on a salary basis of not less than \$250 per week (or not less than \$200 per week if employed in Puerto Rico, the Virgin Islands, or American Samoa). This is exclusive of any compensation through meals or lodging. Persons who are paid enough to qualify for the "short test" are described by the DOL regulations as "high salaried." 29 C.F.R. 541.119, 214, and 315. These compensation figures were adjusted upward in the waning days of the Carter administration, but "postponed indefinitely" in one of the first Executive Orders issued by President Reagan. 46 F.R. 11227 (February 6, 1981) and 46 F.R. 11972 (February 12, 1981). Because it is assumed that everyone employed by a university in an executive, administrative, or professional position would be considered "high salaried" under these obsolete regulations, what follows is a description of only the "short test" as it applies to each of the exemption categories.

Executive Employees

According to DOL regulations, employees compensated *on a salary basis* of not less than \$250 per week are exempt if: (a) their primary duty

consists of management of the enterprise in which they are employed or of a customarily recognized department or subdivision thereof; and (b) they customarily and regularly direct the work of the equivalent of two or more other employees therein. 29 C.F.R. 541.1(f).

Management is defined primarily in terms of supervising the workforce and includes the following elements:

- Interviewing, selecting, and training employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing their work;
- Maintaining records for use in supervision or control;
- Appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status;
- Handling their complaints and grievances and disciplining them when necessary;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among the workers; and
- Providing for the safety of the workforce and the property of the employer. 29 C.F.R. §541.102(b).

Although supervising the equivalent of two or more employees is a threshold requirement for the executive exemption, employers should be cautious about relying on it if there are only two, or perhaps three, subordinates. The DOL regulations make it clear that the exemption would rarely be recognized in situations where the employee has only two subordinates. 29 C.F.R. §541.105(c).

Administrative Employees

Employees compensated on a salary basis of not less than \$250 per week are exempt as administrative employees if (a) their primary duty involves office or non-manual work *directly related to the management policies or general business operations* of the employer for the employer's customers, and (b) the work requires the exercise of discretion and independent judgment. 29 C.F.R. §541.2(e)(2).

In many respects, the administrative exemption is the most difficult to apply. There are three broad categories of positions that generally fit the exemption. The first is the executive or administrative assistant position, limited primarily to persons working directly for a chief executive officer or general manager. The second is the administrative staff position, including persons in charge of functional departments including one-person departments, such as purchasing, safety, human resources and others related to the general business operations of the enterprise. The third category is for persons who perform special assignments, and is limited primarily to employees who perform their duties away from the regular place of business.

A very important aspect of the administrative exemption is that the work must be *related to management policies or general business operations*. In general, this involves positions engaged in "administering" the business of the employer rather than actively "producing" the goods and services offered by the employer. In a university setting, therefore, the administrative exemption is probably not available to persons who are directly involved in teaching, coaching, counseling, or tutoring (many of these would instead be eligible for the professional exemption described below). However, those whose responsibilities require discretion and independent judgment in the areas of general administration, record keeping, human resources, financial aid, admissions, affirmative action, maintenance, construction, purchasing, and public relations might be strong candidates for the administrative exemption.

A major point of discussion in every administrative exemption is *whether or not the employee has the latitude to exercise discretion and independent judgment*. This has generally been interpreted to mean that the employee must have the authority or power to make an independent choice, free from immediate direction or supervision, with respect to matters of significance. This is different from having the ability to apply predetermined criteria to a repetitive decision making process, such as inspection.⁸ Exercising judgment and

8. In *Alabama A. & M. University v. King*, 1 WH Cases 2d 1608 (Ala. Civ. App. 1994), the court held that university residence hall counselors, whose primary duties were inspecting the building for repairs, checking student rooms for cleanliness, securing the dormitory after closing, and

discretion implies being able to not only adapt criteria to meet changing circumstances, but to also use appropriate judgment and discretion in making decisions that commit the employer in substantial respects financially or otherwise.

Professional Employees

Employees paid on a salary basis of not less than \$250 per week are exempt as professional employees if their primary duty consists of: (a) work that requires knowledge of an advanced type in a field of science or learning, and that entails the consistent exercise of discretion and judgment; (b) teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge;⁹ or (c) work in a recognized field of artistic endeavor, including work that requires invention, imagination or talent.

Many persons employed in higher education are eligible for the professional exemption. Faculty, of course, by virtue of holding an advanced degree and teaching in their discipline, are covered by this exemption. Others, including counselors, healthcare professionals, attorneys, and accountants would qualify, as well.

Computer-Related Occupations

In the FLSA amendments of 1996, Congress exempted from overtime requirements highly-skilled computer systems analysts, programmers, and software engineers, as well as various other computer-related positions if they paid at least \$27.63 an hour and included among their primary job duties:

- The application of systems analysis techniques and procedures, including consultations with users in order to determine hardware, software, or system functional specifications;

sending work orders to the maintenance department, did not exercise discretion and independent judgment, and were not exempt administrative employees. Interestingly, the court did not cite *Marshall v. Regis Educational Corporation*, 666 F.2d 1324 (10th Cir. 1981), which held that Regis College residence hall assistants, who received reduced room rates and a \$1,000 tuition credit for approximately 20 hours per week of counseling students and maintaining order, were not employees under the FLSA, but rather student recipients of financial aid similar to college athletes and student government officers.

9. The burden is on the university to prove that faculty are employed in a bona fide professional capacity. *Prakash v. American University*, 727 F.2d 1174, 1178 (D.C. Cir. 1984).

- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs including prototypes; based on and related to user or system design specification;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- Any combination of the above duties requiring the same level of skills. 29 U.S.C. §213(a)(17).

Independent Contractors

There is a temptation to avoid issues of over-time compensation by creating new positions or reclassifying certain existing positions as independent contractors. The theory is that these contractors will be paid as vendors, and the institution will not be liable for income tax withholding, FICA, workers' compensation, insurance, or *overtime compensation*. Putting this theory into practice, however, requires careful analysis. In general, the courts will apply the following criteria to determine whether a true independent contractor relationship exists:

- The degree of independent decision-making, judgment, and initiative exercised by the person performing the services;
- The method of payment (persons compensated on an hourly or daily basis rarely qualify as independent contractors);
- The degree of independent business organization and operation, including the opportunity for profit and loss;
- Whether the person offers the same services to other businesses and institutions;
- Whether the service performed by the person is an integral part of the employer's business;
- The degree to which the employer controls or directs the methods used in performing the work;
- Whether the work is performed on the employer's premises or elsewhere;
- Whether the person performing the work utilizes his or her own tools and supplies in performing the work; and

- Whether the person performing the work is specifically certified for the type of work, or has special training and expertise.

The DOL and the courts will consider all of these factors (and possibly others) in determining independent contractor status on a case-by-case basis. Extreme care should be taken when classifying any position as an independent contractor; and finally, competent advice should be sought before converting any existing employee into an independent contractor category, even if the employee supports the change.

NONEXEMPT EMPLOYEES

The FLSA requires that employers must pay nonexempt employees at least one and one-half times their "regular rate" for each hour over 40 actually worked during the workweek. Although this is the basic principle, there are dozens of variations and exemptions, some of which are exceedingly complex. Because of the amount of money that could be involved in backpay awards under these provisions, it is important to understand the following concepts regarding the compensation of non-exempt employees.

Regular Rate

In order to calculate the overtime compensation, one must first determine an employee's "regular rate." 29 C.F.R. §778.107-122. This can be done by dividing the total compensation earned by the employee during the workweek (without overtime premiums) by the number of hours actually worked. The importance of using this form of calculation is that, if the employee is earning bonuses, commissions, or incentives, for example, these are added into the total compensation for purposes of calculating the "regular rate." Thus, if an employee who works 50 hours per week, has an hourly wage of \$8.00 per hour, and is paid a non-discretionary \$100 bonus a week for achieving certain incentives, the overtime rate is \$15.00 per hour ($\$500 \div 50 \times 1.5$) rather than \$12.00 per hour ($\$8.00 \times 1.5$).

As with all aspects of overtime compensation, there are a number of variations and exceptions. For example, "regular rate" includes wages,

salaries, shift differentials, on-call pay, incentive pay, non-cash compensation (e.g., goods, foods, and lodging), and non-discretionary bonuses. On the other hand, certain types of fringe benefits and bonuses are not considered compensation for the purposes of calculating the "regular rate." These include: expense reimbursement, gifts, discretionary bonuses, and pay for time not worked (e.g., holidays, vacations, sick leave, personal time and jury duty). Also, certain payments for working overtime on a daily basis, and for other purposes, may be excluded from the calculation of the "regular rate," and are used as a credit toward the employee's overtime compensation. 29 C.F.R. §§778.200-207.

Hours Worked

In order to calculate the "regular rate," the employer must determine exactly how many hours the employee worked during the week. Generally, periods of idleness during the workweek that are of short duration and during which the employee is unable to use the time effectively for his or her own purposes, are considered working time. On the other hand, periods during which an employee is completely relieved from duty, and that are long enough to enable the employee to use the time effectively for his or her own purposes, are not hours worked. Obviously, there are a variety of circumstances that fall somewhere on the spectrum between "on duty" and "off duty" that require careful analysis. Examples of these include the following.

On-call time. Employees required to remain "on-call" on the employer's premises or so close that they cannot use the time effectively for their own purposes are considered to be working. On the other hand, employees not required to remain on the premises, but merely required to leave word at home or with company officials where they may be reached, are not working while on-call. The critical factors in determining whether the on-call employee is working are the time that the employee has to report back to work if called and/or the distance that he or she is allowed to travel from the site of employment during the on-call hours. 29 C.F.R. §785.17.

Rest periods. Rest periods from 5 to 20 minutes must be counted as hours worked. While the FLSA does not require employers to provide employees with rest periods, the DOL considers that rest periods of short duration are designed to promote the efficiency of employees and must, therefore, be considered *working time* for purposes of compensation. 29 C.F.R. §785.18.

Mealtime. Rest periods are not the same as mealtimes. Breaks of 30 minutes or more, during which the employee normally does not perform any duties, may be excluded from working time for purposes of compensation. Although some employers will grant paid mealtimes, there is no requirement in the FLSA to pay for meal breaks of 30 minutes or more. 29 C.F.R. §785.19.

Travel time. Commuting time from an employee's home to place of work is not time worked. However, travel from job site to job site during the workday must be counted as time worked. If an employee travels from home directly to another city and returns in the same day, all of the time away from home, except for meal periods, would be considered working time. If the travel keeps the employee away from home overnight, all travel time *during normal working hours* (including Saturdays and Sundays) is considered working time. But, the time spent in overnight travel away from home as a passenger on an airplane, train, boat, bus, or automobile, *outside of normal working hours*, is not considered working time. 29 C.F.R. §§785.33-41.

Other issues. A variety of other issues often arise in connection with calculating hours worked, including sleeping time, preparatory time, medical attention, civic and charitable work, jury duty and grievance proceedings. Competent legal advice should be sought if problems arise in these areas.

Joint Employment

Sometimes, when working for two or more employers, the employee's aggregate time worked is more than 40 hours per week, but the work for any one employer is less than 40 hours per week. If the employee is working for the two employers, as a result of an arrangement between the employers or where one employer is acting directly or

indirectly on behalf of the other, a situation of "joint employment" would be deemed to exist; consequently, the employers would be mutually liable for overtime compensation. 29 C.F.R. §791.2(a). Furthermore, as a general rule, an employee who works for two different departments within the same institution or governmental entity (e.g., university) is entitled to overtime compensation based on the total number of hours worked.

On the other hand, if the two employers are entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, each employer may disregard, for purposes of determining whether overtime compensation pay is due, the work performed by the employee on behalf of the other. Public safety employees may, however, on an optional basis (i.e., voluntarily), be employed in outside fire protection, police, or related details without counting those hours toward overtime compensation. 29 C.F.R. Part §553.227.

Different Jobs for Same Employer

Occasionally, an employee will want to work two or more different jobs for the same employer, each at a different pay scale. In such cases, the employee will be entitled to overtime based upon a regular rate calculated as the average hourly rate earned during the week. 29 C.F.R. 778.115. However, alternatively, by written agreement in advance of the work performed, the employee may prefer to have the overtime rate calculated on the basis of the wage rate of the job actually worked during such overtime hours. 29 C.F.R. §778.419.

Alternatives to Overtime Compensation

In work situations where the number of hours worked fluctuates from week to week, the FLSA permits certain limited arrangements whereby the employee is paid a fixed salary even if total hours drop below 40 in a workweek; however, the time and one-half rate for overtime applies to only those overtime hours determined on a bi-weekly or monthly basis. 29 C.F.R. §778.400-414. Other arrangements provide for overtime at 50%, rather than 150%, of the regular rate, as was discussed in greater detail earlier in this pamphlet. Under this method of compensation, an employee is paid

a fixed salary covering whatever number of hours the job demands in a given week. With straight time already compensated in the salary, only one-half of the basic rate (i.e., "half-time") must be paid for overtime. 29 C.F.R. §778.114. The regulations with respect to these arrangements are quite complicated, and competent legal advice should be sought before entering into such a compensation program.

Employees at hospitals or residential care facilities, for example, may be placed on 14-day schedules and, if certain conditions are met, would not be eligible for overtime unless they worked more than 80 hours during that time period. 29 C.F.R. §778.601.

By way of further illustration, in the public sector, provided certain conditions are met, law enforcement personnel may not be eligible for overtime compensation until they have worked more than 172 hours in a 28-day work period (an average of 43 hours per week),¹⁰ and fire protection personnel more than 212 hours in a 28-day period (an average of 53 hours per week). Other narrow exceptions to overtime compensation, such as a formal "Comp Time" arrangement, may be available in the public sector. 29 C.F.R. Part 553.

Volunteers

Universities utilize a wide range of volunteers in their activities. Trustees, parents, alumni, students, and members of the community may all be involved in one way or another in voluntary efforts on behalf of the institution, from fundraising to ushering at public events to reshelving books at the library. As long as these volunteers are not otherwise employed by the institution, the FLSA analysis is relatively straightforward. The DOL has issued a series of *Opinion Letters* over the years establishing that no employment relationship is created when individuals volunteer and donate their services without expectation of payment for activities of a humanitarian, public service or religious nature. The FLSA Amendments of 1985 made it clear for public agencies that no employment relationship is created if the

10. However, at least one court has denied the application of these provisions to law enforcement employees at a public university. *Adams v. Pittsburg State Univ.*, 1 WH Cases 2d (BNA) 1061 (D. Kan. 1993).

volunteer is not otherwise employed by the agency and receives no compensation, or is paid only expenses, reasonable benefits, or a nominal fee for the voluntary services. 29 U.S.C. §203(e)(4)(A)(I).

Voluntary Work by Employees

The FLSA issues become more difficult, however, when a *current employee* "volunteers" to provide services for the institution. In the public sector, of course, there is a statutory ban on an employee volunteering to perform "the same type of services" for which he or she is otherwise employed by the agency. 29 U.S.C. §203(e)(4)(A)(ii).¹¹ For non-profit organizations, the DOL has ruled by *Opinion Letter* that it would not regard time spent by employees in voluntary activities for the organization as compensable working time if:

- The services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering;
- The activities are predominantly for the employee's own benefit;
- The employee does not replace another employee or impair the employment opportunities of others by performing work that would otherwise be performed by regular employees;
- The employee serves without contemplation of pay;
- The activity does not take place during the employee's regular working hours or scheduled overtime hours; and
- The volunteer time is insubstantial in relation to the employee's regular hours. *Opinion Letter WH-369* (December 3, 1975).

State and Local Wage Laws

Despite the scope and detail of the FLSA, it does not preempt any state or local wage laws that provide greater protection to employees. 29 U.S.C. §218. Thus, state and local governments may enact statutes or ordinances establishing a

11. The effect of this provision is that "voluntary" activity would be added to working time for purposes of calculating overtime and minimum wages. There may be no impact, therefore, if minimum wage is not triggered and when: (a) even including the voluntary activity, total working time does not exceed 40 in a work week; or (b) the position is exempt.

higher minimum wage, a lower hourly threshold for overtime compensation, stricter limits on the ability of the employer to take deductions from the compensation of a salaried employee, or greater protections for child labor. The most important concern, in terms of the issues covered by this publication, is the enactment, by many states, of laws setting special requirements for overtime compensation. Some states, for example, require overtime compensation for all hours in excess of eight worked in one day or in one shift, regardless of how many hours are worked in the workweek. Overtime premiums paid as a result of such laws, or as a result of similar provisions in a collective bargaining agreement, are generally credited against the FLSA requirement of overtime compensation calculated on a weekly basis. 29 C.F.R. §§778.200-207. Special state overtime provisions may be limited to certain occupants, such as truck drivers, or they may be applicable to all nonexempt occupations. It is important, therefore, in analyzing FLSA issues to be cognizant of the impact of state and local laws; they can have a significant influence on how employees are scheduled and compensated.

RECORDKEEPING AND PENALTIES

The FLSA requires employees to preserve the following records for at least two years:

- Basic employment and earnings records;
- Work schedules;
- Wage rate tables;
- Order, shipping and billing records;
- Records of additions to or deductions from wages paid.

In addition, the FLSA requires each employer to preserve the following records for at least three years:

- Payroll records;
- Certificates, collective bargaining agreements and individual contracts;
- Sales and purchase records;
- Agreements on overtime pay for pieceworks, hourly, or basic rates.

In the event that an employer incorrectly classifies employees as exempt, the DOL may order the employer to pay overtime on a backpay basis for two years or, in the case of "willful" violations, three years. Because time records are not normally kept for employees paid on a "salary basis," the technique used by the investigator is to ask each incorrectly-classified employee how many hours he or she worked during the past two or three years. The employer is then liable for all of the premium overtime pay associated with all hours worked in excess of 40 for each workweek. The penalties may be quite sizable, and may include backpay, liquidated damages, and attorneys fees.¹² Additionally, because injunctive relief, including reinstatement and prohibitions against future violations, as well as criminal sanctions, are possible, employers are well-advised to seek competent legal advice to avoid such liability.

12. For discussion of FLSA liquidated damages in a higher education context, see *Thomas v. Howard University Hospital*, 39 F.3d 370 (D.C. Cir. 1994).

Also Available from NACUA

Pamphlets/Monographs

- Understanding Attorney-Client Privilege in the College and University Setting. \$12.00
Computer Access: Selected Legal Issues Affecting Higher Education. \$12.00
Access to Institutions of Higher Education for Students with Disabilities. \$12.00
Accommodating Faculty and Staff with Psychiatric Disabilities. \$12.00
Ownership and Retention of Data. \$7.50
How to Conduct a Sexual Harassment Investigation. \$7.50
A Guide to Copyright Issues in Higher Education. \$15.00
Minority-Targeted Admissions and Financial Aid Programs. \$10.50
Defamation Issues in Higher Education. \$7.50
The Permissibility of Withholding Transcripts Under Bankruptcy. \$4.50
The Family Medical Leave Act of 1993: Applications in Higher Education. \$6.50
Looking a Gift Horse in the Mouth. \$6.50
Acquaintance Rape on Campus: A Model for Institutional Response. \$12.50
Managing Federal Student Financial Aid Programs. \$9.50
Responding to Whistleblowers. \$6.50
What to Do When OSHA Comes Calling. \$6.50
Crime on Campus. \$9.50
Risky Business: Risk Management, Loss Prevention and Insurance Procurement. \$6.50
Peer Review Confidentiality: Is It Still Possible? \$6.50
Technology Transfer and Risk Management. \$6.50
Complying with "Drug-Free Workplace" Laws. \$6.50
All Pamphlets and Monographs (a \$190.00 value) \$170.00

Compendia

- Sexual Harassment on Campus, Third Edition. \$40.00
Student Disciplinary Issues, Second Edition. \$45.00
Accommodating Students with Learning and Emotional Disabilities. \$42.50
Employment Issues in Higher Education. \$37.50
Title IX Gender Equity Athletic Program In-House Audit. \$15.00
Academic Program Closures. \$29.50
Regulating Racial Harassment on Campus. \$18.00
Practical Aspects of Technology Transfer. \$18.00
Instructional Supplement to *The Law of Higher Education*. \$45.00
1997 Supplement to *The Law of Higher Education*. \$40.00
Am I Liable? \$20.00
Legal Issues in Faculty Employment. \$15.00
Student Legal Issues. \$15.00
Legal Issues in Athletics. \$15.00

To receive a NACUA Publications Brochure with detailed descriptions of the resources listed above or to place an order:

- write: NACUA Publications, One Dupont Circle, Suite 620, Washington, D.C. 20036
- e-mail: nacua@nacua.org, or
- visit our homepage: <http://www.nacua.org>

PREPAID ORDERS ONLY.

National Association of College
and University Attorneys
One Dupont Circle, N.W.
Suite 620
Washington, D.C. 20036
202-833-8390
FAX 202-296-8379
<http://www.nacua.org>